No. 99-1718

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LESVILLE JAMES, as assignee of the rights of MERIDIAN ENGINEERING, INC. and COMPANION, INC., d/b/a COMPANION ASSURANCE COMPANY,

Petitioner,

v.

ZURICH-AMERICAN INSURANCE COMPANY OF ILLINOIS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Zurich-American Insurance Company of Illinois is the Respondent ("Respondent"). Zurich American Insurance Company, as successor in interest to Zurich Insurance Company, is the entity that issued the insurance policy at issue. Respondent is 100% owned by American Zurich Insurance Company, which is owned by Steadfast Insurance Company, which in turn is owned by Zurich American Insurance Company. Zurich American Insurance Company is 100% owned by Zurich Holding Company of America, Inc., which is a wholly owned subsidiary of Zurich Insurance Company, Switzerland.

TABLE OF CONTENTS

	Page
REASONS FOR DENYING THE WRIT.....	1
THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION.....	2
CONCLUSION.....	9

TABLE OF AUTHORITIES

Page

Cases

Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 89 F.3d 976 (3d Cir. 1996)..... 4

New Castle County v. Hartford Accident & Indemnity Co., 970 F.2d 1267 (3d Cir. 1994)..... 4

Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co., 124 F.3d 508 (3d Cir. 1997)..... 4

Other Authorities

Restatement (Second) of Contracts § 202(5) and comment g. 5

V.I. Code Ann. Tit. 1, § 4 (1999)..... 5

REASONS FOR DENYING THE WRIT

While artfully dressed up as a plea to this Court's "general supervisory" powers, this Petition is in reality based on a challenge to the Third Circuit's application of a properly stated rule of law about which there is no disagreement. The case below involved the question of whether the meaning ascribed to an ambiguous insurance policy by the actual parties to that policy resolved the ambiguity and excluded coverage for a third party. Here, all parties to the insurance policy, as well as the insurance broker who drafted the ambiguous language, agreed as to the meaning of the language—and the parties' conduct after entering the contract confirmed that mutual understanding of the parties. The Third Circuit held that the meaning ascribed to the language by the actual parties was controlling.

The reason that this unsurprising, seemingly incontrovertible principle ended up being litigated stems from the fact that Petitioner is the assignee of a third-party claiming to be a putative insured under the insurance policy at issue. That third-party, Meridian Engineering, Inc. ("Meridian"), is a complete stranger to the insurance policy that seized an opportunity to take advantage of an ambiguity in the named insured provision. When Respondent refused to yield to Meridian's demands for coverage after all of the actual parties to the insurance policy concluded that none existed, Petitioner and Meridian entered into a consent judgment against Meridian for $1 million dollars. Petitioner then accepted a fraction of that sum from Meridian, money that was paid by Meridian's insurer, and Petitioner took an assignment of Meridian's purported rights against Respondent, Zurich American Insurance Company of Illinois ("Zurich").

This case is a garden-variety insurance policy dispute. To his credit, Petitioner does little to disguise the fact that his Petition is a far-fetched attempt to shoe horn this case into this Court's general supervisory jurisdiction. According to Petitioner, the Third Circuit erroneously substituted its own *de novo* findings of fact for those of the District Court without holding that those findings of fact were clearly erroneous, thereby purportedly requiring this Court to exercise its supervisory power.

However, the Third Circuit did no such thing. The District Court misapplied the controlling Virgin Islands law. In reversing the District Court, the Third Circuit properly exercised *de novo* review of the District Court's interpretation of Virgin Islands law and applied the overwhelmingly one-sided facts to that law. In reality, that is the crux of this matter—a fact that is skillfully obscured by Petitioner because the rules of law are not disputed and the Third Circuit's application of those properly stated rules is not enough to trigger this Court's jurisdiction. The Third Circuit's decision is so firmly supported by the facts and the law that Petitioner's writ application in this case borders on the frivolous.

THE DECISION BELOW DOES NOT RAISE THE QUESTION PRESENTED BY THE PETITION

The case below involved the question of whether the meaning ascribed to an ambiguous insurance policy by the actual parties to that policy resolved the ambiguity and excluded coverage for a third party. The evidence of the parties' intent in this case was unanimous and overwhelming. The case was tried to the Court with each side presenting written and oral legal argument and submitting evidence, including deposition testimony. There was no live testimony. There were five witnesses from the insured, Hess Oil Virgin Islands Corp. "HOVIC"), including an individual

who negotiated and helped draft the policy and several individuals charged with administering claims under the policy. They all testified that Meridian was not covered. Pet. App. at 144-46. There were two witnesses from Zurich, namely, the underwriter responsible for negotiating and issuing the policy and the claim representative responsible for handling claims under the policy. They too testified that Meridian was not covered. *Id.* at 144, 145. Finally, there was a witness from the insurance broker responsible for drafting the ambiguous policy language, who also testified that Meridian was not covered. *Id.* at 144.

The District Court concluded that Meridian was covered under the Zurich policy based on two summaries of the Named Insured provision. The summaries were never intended to be a substitute for, or a vehicle to interpret, the Named Insured provision, and the two authors of the summaries (one from the broker and one from Zurich) both repeatedly so testified. Nonetheless, based on those two summaries, the Court discredited the deposition testimony of the Zurich underwriter that the parties did not intend Meridian to be covered. The legal error made by the District Court was in completely disregarding the overwhelming testimony concerning the practical construction given to the policy language by the insurer and the insured in administering the policy. That conduct demonstrated the parties' mutual intent that third parties like Meridian were not insured under the policy.

The question presented by the writ application hinges on Petitioner's confusion of the District Court's findings of fact with its conclusions of law. The District Court provided some help in that regard by clearly and separately labeling each. The crux of this Petition is the District Court's holding in its "Conclusions of Law" that "the intent of the parties in *negotiating* the contract was to provide coverage for all contractors and subcontractors who worked on the FCCU

Project. The Court further finds the testimony regarding the administration of the policy after it had been executed to be insufficient to support a contrary conclusion, as that process was done by individuals without any direct knowledge of the intent of the parties in *negotiating* the policy." Pet. App. at 38-39 (emphasis added). This was a misapplication of the applicable Virgin Islands law.

The Third Circuit properly exercised plenary review of the above legal conclusion because it involved the correct construction and legal operation of an insurance policy. *See, e.g., New Castle County v. Hartford Accident & Indemnity Co.*, 970 F.2d 1267, 1270 (3d Cir. 1994); *Pittston Co. Ultramar Am. Ltd. v. Allianz Ins. Co.*, 124 F.3d 508, 515 (3d Cir. 1997). Moreover, it was undisputed that Virgin Islands contract law was applicable in this case. Accordingly, the Third Circuit applied Virgin Islands contract law and it properly exercised *de novo* review over the District Court's interpretation of that law. *See, e.g., Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 983 (3d Cir. 1996). Pet. App. at 11.

The Third Circuit concluded that the District Court had misapplied Virgin Islands contract law by focusing its analysis on the purported negotiation of the contract to the exclusion of the parties' consistent conduct in implementing the contract. Thus, aside from the fact that the testimony of those involved in negotiating the contract actually was that contractors like Meridian were not covered under the Zurich policy, the Third Circuit held that it was a legal error for the District Court to disregard the practical construction of the policy by the actual parties to the contract. In other words, as a matter of law, it was error to interpret the policy based on two mere summaries of the named insured provision to the exclusion of the evidence of the parties' actions under the contract simply because one of the summaries was prepared when the policy was being negotiated. This holding by the

Third Circuit is fully supported by Virgin Islands contract law.

All of the ALI Restatements of the Law, including the Restatement (Second) of Contracts, have been adopted by the Virgin Islands Legislature as the rules of the common law in the Virgin Islands in the absence of local laws to the contrary. V.I. Code Ann. tit. 1, sec. 4 (1999). Pet. App. 13 and n.14. Because there are no local laws to the contrary, the Restatement of Contracts governs the interpretation of the contract in this case. The Restatement repeatedly emphasizes the importance of the parties' conduct in construing contracts. Thus, Restatement section 202(5) provides:

> Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other *and with any relevant course of dealing*, or usage or trade. (emphasis added).

Comment g. to this Restatement section further emphasizes the point as follows: "The parties to an agreement know best what they meant, *and their action under it is often the* ***strongest*** *evidence of their meaning*." (emphasis added).

The District Court's disregard of the post-contracting conduct of Zurich and Hess Oil was a legal error in construing the insurance policy and not a finding of fact. The District Court itself acknowledged that the evidence firmly established that this conduct showed that those implementing the policy believed that Meridian was not covered. Thus, in denying the parties' cross-motions for summary judgment, the Court concluded:

> The affidavits, depositions and other documentation submitted by Zurich show that the individuals that have administered the insurance policy [at Zurich, Amerada Hess and Hess Oil] all agree that Meridian would not be covered according to the way that the Zurich policy has been administered. James has offered no evidence to controvert Zurich's position concerning the interpretation of the policy by those administering it. Pet. App. at 67.

While Petitioner tried mightily to find something besides the two summaries to support his position, the direct testimony as to whether contractors like Meridian were intended by Zurich and HOVIC to be covered by the policy was a unanimously resounding "No." Accordingly, in applying the undisputed facts to the applicable Virgin Islands law, the Third Circuit concluded that, under the circumstances of this case, the District Court's acknowledgement that the parties to the insurance policy all agreed that Meridian would not be covered according to the way the policy had been administered "really should have spelled the end of the matter." Pet. App. at 15. As the Court explained:

> After all, the parties to a contract are free to define and clarify—or even to change—the contract's terms, and Zurich and Hess Oil did precisely that by pursuing a course of conduct consistent with their mutual understanding of the Named Insured provision. *Id.* (footnote omitted).

Petitioner also claims that the Third Circuit made alternate factual findings and that the findings were based on issues that had never been raised by Zurich. Pet. at 20-21. Petitioner is wrong on both counts. Again, the ostensible alternative factual findings actually involved the Third Circuit's legal conclusion that even if Zurich and Hess had originally intended to cover all subcontractors, the parties' "later practical application of the Named Insured provision in a totally different fashion must prevail, because Meridian never had any vested rights in the terms of the policy as originally written." Pet. App. at 16. The factual predicates for this conclusion were undisputed in the record. *Id.* at 17-18.

Moreover, Zurich argued at every single opportunity that Zurich and Hess at all times intended that the Zurich policy would only cover contractors and subcontractors that Hess contractually agreed to insure. After all, that was the sum and substance of every single witness' testimony, including those witnesses involved in the actual drafting and negotiation of the policy. However, to the extent that there could be any question as to the parties' intent, then the clear import of Zurich's argument was that the contracting parties' course of conduct should be viewed as a clarification of the ambiguous language. That was the whole point of Zurich relying on so many witnesses knowledgeable about the parties' conduct in implementing the policies.[1] Thus, summing up the seemingly obvious, the Third Circuit concluded:

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[1] In fact, there were so many such witnesses that the District Court apparently lost sight of the fact that there were witnesses in addition to Zurich's underwriter who were knowledgeable about the negotiation of the policy, namely, the broker and the Hess Manager of Corporate Insurance. *See* Pet. App. at 32 (findings 5 and 6) and 144.

> Any way you slice it, then, the undisputed conduct of the parties controls the terms of the contract between them, thus excluding coverage for Meridian. Pet. App. at 18.

Finally, Petitioner claims that the Third Circuit made another *de novo* factual finding when it refused to construe the Zurich policy in favor of coverage without resorting to extrinsic evidence because Zurich and HOVIC agreed on the interpretation of the policy. Pet. 23. Again, this was another legal conclusion by the Court, not a factual finding. But even more fundamentally, Petitioner's implication that there was no finding that Zurich and HOVIC agreed on the interpretation of the policy is astonishing on its face given the record in this case. The one thing that is absolutely clear from the record is that all of the testimony in this case establishes that Zurich and HOVIC (and the broker for that matter)—witnesses from the past and witnesses from the present--all agreed on the interpretation of the policy. *See, e.g.*, Pet. App. at 144-46.

Thus, relying on well-settled, common sense law in the Third Circuit, the Court recognized that contra proferentem construction of an ambiguous insurance policy may be appropriate in a contract dispute between the insurer and insured, when each have different views of the coverage, but:

> here we are called on to decide a very different question: whether a third-party entity is entitled to policy coverage where the contracting parties have agreed on a negative answer but that third party objects. Pet. App. at 19.

There is no dispute that the Third Circuit properly stated Virgin Islands contract law. The record and the Third Circuit's decision demonstrate that Petitioner is dissatisfied with the Third Circuit's application of the controlling law to the facts of this case. Accordingly, the law cited by Petitioner concerning Federal Rule of Civil Procedure 52(a) is undisputed by Respondent and it is irrelevant. Petitioner's reliance on Rule 52(a) is premised on his "straw man" argument that the Third Circuit made *de novo* factual findings, when in fact it exercised *de novo* review of the District Court's application of Virgin Island's law. This case presents no reason for this Court to exercise its general supervisory powers. Rather, this is a case that never should have seen the light of day and should, at a minimum, have been dismissed long ago at the summary judgment stage. It should finally be laid to rest.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

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